

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHARON S. MYHRE,

Plaintiff-Appellant,

v

WALTER G. MYHRE,

Defendant-Appellee.

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UNPUBLISHED

October 26, 2001

No. 222404

Wayne Circuit Court

LC No. 98-814723-DM

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered September 1, 1999. We reverse and remand for further findings of fact.

**I. Basic Facts and Procedural History**

The parties were married two separate times. The first marriage lasted four years, ending in 1983. The default judgment of divorce ending this first marriage did not provide alimony to the wife and did not address either party's pension or retirement benefits. On December 20, 1991, approximately eight years after their first marriage ended, the parties remarried. Six years and five months thereafter, on May 11, 1998, the wife filed for divorce a second time.

The trial in this matter mainly focused on the division of property and spousal support. According to the testimony adduced at trial, the wife began to experience significant health problems near the end of the first marriage. The record reveals that the wife suffers from multiple adhesions that grow around her organs, which requires extensive surgery to correct. Because of this condition, the wife is unable to work. She began to receive Social Security Disability benefits on or about November 27, 1984, which continue to date.

After taking evidence, the trial court rendered its decision on May 12, 1999. Neither the parties nor counsel for the parties were present during the proceeding wherein the trial court rendered its ultimate disposition. Notwithstanding, a review of the record reveals that the trial court failed to address all of the requisite spousal support and

property division factors in rendering its decision. Accordingly, we vacate the judgment and remand for further findings of fact.

## II. Alimony

Plaintiff first challenges the amount of alimony awarded her. This Court reviews a trial court's factual findings relative to an award of alimony for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Whether to award alimony and the amount actually awarded are dispositional rulings that this Court reviews de novo. *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). The lower court's decision should only be overturned when we are left with the firm conviction that the decision was inequitable. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

Pursuant to MCL 552.23, the trial court enjoys discretionary authority to award alimony "as it considers just and reasonable in light of all the circumstances." *Ianitelli, supra* at 642-643. (Citing *Demman v Demman*, 195 Mich App 109, 110, 489 NW2d 161 (1992)). Eleven distinct factors outline the "circumstances" which the trial court must consider when fashioning an alimony award: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, and (11) general principles of equity. *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991).

In the case at bar, the record is devoid of any clear factual findings on these very specific factors justifying the trial court's decision to award alimony. At best, the trial court considered the parties' past relations, the length of the marriage, and the parties' respective ages. Beyond noting that the wife is "in poor health," the trial court did not make mention of the other factors upon which it ultimately determined that \$150.00 per week in alimony was "just and reasonable" "in light of all the circumstances." *Ianitelli, supra* at 642-643. Consequently, there is an insufficient record upon which to review the trial court's determination. Review is impossible when the lower court failed to make sufficient findings of fact. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). When the court has failed to do so, the case must be remanded. *Id.* at 163. Because the trial court did not consider all of the relevant factors governing its discretionary decision to award alimony, we vacate the judgment and remand for further factual findings in this regard. *Daniels v Daniels*, 165 Mich App 726, 732; 418 NW2d 924 (1988). On remand, the lower court shall make specific findings of fact on all of the requisite factors underlying its ultimate determination. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Ianitelli, supra* at 643.

## III. Pension Benefits

Next, plaintiff appeals the trial court's limitation on her award of defendant's pension benefits to only those that accrued during their second marriage. Plaintiff

requested fifty percent of all defendant's pension benefits, or at least the addition of those accruing during the parties' first marriage to each other two decades ago. Although we need not reach the issue whether the alimony award and the property division were equitable, some instruction regarding premarital pension benefits is warranted. Such benefits may be awarded whenever it is just and reasonable, under the circumstances. *McMichael v McMichael*, 217 Mich App 723, 730-731; 552 NW2d 688 (1996); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). The parties' ability to pay along with their character and situation constitute relevant circumstances. *Id.*

Pension benefits that accrued during a previous marriage between the parties may still be divided if the issue was not actually determined in the original divorce and, at that time, the court was not required to consider the pension. *McMichael*, *supra* at 727-728. Michigan's statute requiring courts to consider the parties' pension benefits, MCL 552.18, was not enacted until 1985, two years after the parties' first divorce. See 1985 PA 43. The evidence indicates that the pension issue was neither previously addressed or resolved in the first divorce. Therefore, the pension benefits are subject to division if just and reasonable. *McMichael*, *supra* at 727-728, 730-731.

#### IV. Attorneys Fees

Plaintiff also argues that the lower court erred when it denied plaintiff's request for attorney fees. A court may award a divorcing party attorney fees when necessary to enable that party to prosecute or defend the suit. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The requesting party, however, must allege facts at trial that sufficiently demonstrate an inability to carry on the lawsuit. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Here, plaintiff failed to offer any evidence regarding the amount of attorney fees she incurred. Further, the issue is not reviewable on appeal because plaintiff failed to include it in her questions presented. MCR 7.212(C)(5); *Greathouse v Rhodes*, 242 Mich App 221, 240; 618 NW2d 106 (2000). An issue not properly set forth in the statement of questions presented is waived. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). We therefore decline to address this issue.

#### V. Reassignment to Different Judge

Upon remand, counsel for plaintiff requests a different judge. Remand to a different judge is appropriate where it is unreasonable to expect the trial judge to set aside "previously expressed views . . . without substantial difficulty." See *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995). A review of the record in the case at bar does not indicate that the trial court would experience "substantial difficulty" setting aside its previous findings. Nor has plaintiff demonstrated any actual bias or prejudice on the part of the trial court. *B&B Investment Group v Gitler*, 229 Mich App 1, 17; 581 NW2d 17 (1998). However, on remand, we caution the trial court to consider and resolve the substantive issues presented in the matter brought before it, disregarding any personal feelings on the propriety of no-fault divorce in Michigan.

Reversed and remanded for findings of fact regarding the award of alimony and the division of defendant's premarital pension benefits. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra